at his wife's parent's house. Similar views have already been expressed by Choor Singh J. in the case of *Koh Teng Lam* v. *Elsie Koh Chen Chee & Anor.*[4] where His Lordship said:

"There is one other very important consideration in this case. It is the possibility of the petitioner and the respondent becoming reconciled. The granting of the custody to the respondent in this case will keep alive some hope, even though slight, of a reconciliation. The petitioner may in time realise that he has been listening to false and malicious rumours. If custody is granted to the petitioner, there will be, in my opinion, no hope at all of a reconciliation. The possibility of a reconciliation is clearly an important matter which I must take into consideration in deciding the question of custody."

Again in *Loh Kon Fah* v. *Lee Moy Lan*[5] the Federal Court endorsed the following views of Hashim Yeop Sani J. (as he then was):

"In my judgment the learned judge was quite right in taking the view that so long as the marriage subsisted between the parties and there were no obstacles in the way of the appellant visiting his children at any time, the mother should have the custody. There was evidence that the eldest child, a girl, was doing remarkably well at school in Singapore and so were the other two children. The learned judge must have had in mind the emotional upset if the children were torn away from the mother. Speaking for myself, it was impossible for me to say that the learned judge had either given weight to irrelevant or unproved matters or omitted to take into account matters that were relevant. Nor was I in a position to say that the decision of the learned judge was improper, unjust or wrong."

There is no obstacle or impediment whatsoever to stop the respondent from visiting his child at the applicant's house as he had done before this unfortunate incident. I am pleased to note from the wife's and her own mother's evidence that they would welcome the respondent to their house for either purpose – to see the child or to effect reconciliation.

In conclusion, I would reiterate what I have said earlier that it is in the interest and welfare of the infant that she should continue to remain in the custody of her mother.

Accordingly this application is allowed.

Application allowed.

Solicitors: *D.A. Devadason; Foo Nyong Tiam & Associates.*

THE CHARTERED BANK v. RASHID BIN MOHAMED

[O.C.J. (Gunn Chit Tuan, J.) June 25, July 24 & December 10, 1985]

[Kuala Lumpur – Civil Suit No. C2766 of 1983]

Debtor and Creditor – Debt – Assignment – Notice – Civil Law Act, 1956, s. 4(3).

Banking – Debtor and creditor – Assignment of debt to bank – Demand for payment.

In this case the defendant was granted an interest-free loan for the sum of $120,000 by D.Y.M.M. Yang Di-Pertuan Besar Tuanku Ja'afar ibni Al Marhum Tuanku Abdul Rahman (His Royal Highness). By an assignment in writing dated July 15, 1983, His Royal Highness assigned to the plaintiff absolutely the full benefit and advantage of the debt. On September 20, 1983, the plaintiff gave express notice in writing to the defendant of the said assignment and requested that he pay the plaintiff the said sum of $120,000. Despite repeated requests the defendant failed/refused to pay the plaintiff the said sum or any part thereof. The plaintiff then applied to the Senior Assistant Registrar for final judgment against the defendant in the sum of $120,000 together with interest and costs. The application was refused. On appeal,

Held: (1) the defendant was indebted to His Royal Highness in the sum of $120,000 and there was an assignment in writing of the debt in this case under the hand of the assignor;

(2) the assignment was absolute and did not purport to be by way of charge only. Express notice in writing of the said assignment was also given to the debtor, that is, the defendant in this case from whom the said assignor would have been entitled to claim the debt or thing in action;

(3) the provisions of section 4(3) of the Civil Law Act, 1956, have been complied with and there was no defence to the plaintiff's claim. The plaintiff is granted leave to sign final judgment against the defendant for the sum of $120,000 with interest at the rate of 8% per annum from October 15, 1983 to the date of payment and costs.

Cases referred to:

(1) *In re National Motor Mail-Coach Co. Ltd.* [1908] 2 Ch.D. 515.
(2) *Re Westerton, Public Trustee* v. *Gray* [1919] 2 Ch.D. 104.
(3) *European Asian Bank* v. *Punjab and Sind Bank* [1983] 2 All E.R. 508, 516.
(4) *Nouvau Mont Dor (M) Sdn. Bhd.* v. *Faber Development Sdn. Bhd.* [1984] 2 M.L.J. 268, 269.

CIVIL SUIT.

D. P. Naban for the appellant.
Edmund Ponniah for the respondent.

Cur. Adv. Vult.

Gunn Chit Tuan J.: The Chartered Bank (the plaintiff) appealed against the decision of the learned Senior Assistant Registrar given on May 22, 1985, refusing to grant the plaintiff's application to sign final judgment against one Rashid bin Mohamed (the defendant) in the sum of $120,000 together with interest and costs.

In an affidavit dated September 22, 1985, (enclosure 6) sworn by one Derrick Fernandez, a Senior Inspector in the employment of the plaintiff, reference was made to the statement of claim filed by the plaintiff in this action. In the said statement of claim it was averred that the defendant was at all material times indebted to D.Y.M.M. Yang di-Pertuan Besar Tuanku Ja'afar ibni Al Marhum Tuanku Abdul Rahman (His Royal Highness) in the sum of $120,000 being an interest-free loan extended by His Royal Highness to him (the said debt). By an assignment in writing dated July 15, 1983, His Royal Highness assigned to the plaintiff absolutely the full benefit and advantage of the said debt. By notice in writing dated September 20, 1983, the plaintiff gave express notice to the defendant of the said assignment and requested that he pay the plaintiff the same sum of $120,000. Despite requests the defendant has failed and/or refuses to pay the plaintiff the said sum of $120,000 or any part thereof and was therefore at the commencement of this action indebted to the plaintiff in the sum of $120,000.

A copy each of the assignment agreement dated July 15, 1983, and the notice in writing dated September 20, 1983, referred to in the statement of claim were attached as exhibits (DF-1&2) to the said affidavit of Derrick Fernandez.

In a statement of defence dated January 23, 1984, the defendant contended that the alleged assignment dated July 15, 1983, was made for no consideration at all and is, further, void. In support of that contention Mr. James Leslie Ponniah, counsel for the defendant, in an affidavit affirmed on August 21, 1984 (enclosure 9) relied on *In re National Motor Mail-Coach Co. Ltd.*[1] which, he contended, together with other like cases support the view that if payment of a third party's debt is made voluntarily by a plaintiff, there is no obligation on the third party to repay the plaintiff and that therefore this was not a fit case to be disposed of summarily even if the facts are not in dispute (which is not admitted by the defendant).

The defendant also contended that the said notice was served on the defendant long after payment was made by the plaintiff to His Royal Highness the Yang di-Pertuan Besar Tuanku Ja'afar ibni Al Marhum Tuanku Abdul Rahman. It was further contended by the defendant in paragraph 5 of his statement of defence that he had informed the plaintiff not to attempt to make any payment on his behalf to any person. And yet another contention of the defendant in paragraph 6 of his statement of defence was "that in addition to the above-mentioned voluntary payment of $120,000 the plaintiff also made payment of about one million ringgit to His Royal Highness the Yang di-Pertuan Besar Tuanku Ja'afar ibni Almarhum Tuanku Abdul Rahman to avoid the plaintiff from being involved in an embarrassing litigation or investigation."

In an affidavit-in-reply (enclosure 11) affirmed on September 13, 1984, Mr. Thomas Thomas, an advocate & solicitor of the High Court of Malaya and a member of Messrs. Skrine & Company, solicitors for the plaintiff, took issue with Mr. Ponniah's submission in his affidavit of July 21, 1984, that as a matter of law the assignment was void for lack of consideration on the grounds that the assignment in question was an assignment under section 4(3) of the Civil Law Act, 1956, and that consideration was irrelevant. In the event that consideration is relevant to the issue (which is denied by the plaintiff) there was produced and attached to the said affidavit of Mr. Thomas Thomas a copy of the deed of compromise and release executed by the defendant on September 16, 1982, whereby he acknowledged that there was consideration for the payment of $120,000 which was the subject matter of the plaintiff's application herein for summary judgment.

Mr. D.P. Naban, counsel for the plaintiff, after reference to the pleadings and the various affidavits filed in this action referred me to the following paragraph 13 in volume 6 of *Halsbury's* Laws of England (4th. edition):

> "*General effect of statutory provisions.* The foregoing provisions did not create any new rights, but they enabled the legal right to a debt or other thing in action to be transferred to the assignee, together with all legal remedies, including the right to sue in his own name. They have not made assignable contracts which were not assignable in equity before, nor, on the other hand, have they impaired the efficacy of equitable assignments which would previously have been valid. The statutory provisions effected an improvement in the position of a donee of a legal chose in action by enabling him to sue at law in his own name as assignee without regard to whether or not

the assignment was for valuable consideration. To be a valid assignment within the foregoing provisions, an assignment must be of the whole debt or chose in action."

The statutory provisions referred to in the above passage are provisions for legal assignment of debts and other legal things in action contained in section 136(1) of the U.K. Law of Property Act, 1925, which is very similar to section 4(3) of our Civil Law Act, 1956, which reads as follows:

"Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a discharge for the same, without the concurrence of the assignor."

In accordance with the provisions of the said section 136 of the U.K. Law of Property Act, 1925, as well as under the provisions of section 4(3) of our own Civil Law Act, 1956, if certain conditions are complied with, any debt or other legal thing in action may be assigned so as to vest in the assignee the legal right to the same and all the remedies therefor, with power to give a good discharge without the concurrence of the assignor.

The conditions which, according to paragraph 12 in volume 6 of *Halsbury's* Laws of England (4th. Edition), must be complied with are (1) the assignment must be in writing under the hand of the assignor; (2) the assignment must be absolute, and not purporting to be by way of charge only; and (3) express notice in writing of the assignment must be given to the debtor or other person from whom the assignor would have been entitled to claim the debt or thing an action.

Mr. Naban also referred to *Re Westerton, Public Trustee* v. *Gray*.[2] In that case a testator handed to his landlady Mrs. G an envelope addressed to her describing it as a present to her. She was about to open it, when he took it from her and said he would keep it for her and lock it up in his despatch box. After the testator's death there was found in his despatch box an envelope containing: (1) a deposit receipt for £500 deposited with his bank; (2) an order in writing signed by the testator directing the bank to pay to Mrs. G the sum of £500 then on deposit; and (3) a letter addressed to Mrs. G "You have been very kind to me and I decide to make some return by giving you the amount of $500 now on deposit at ... bank as per receipt enclosed." The deposit receipt was not indorsed by the testator and no notice was given to the bank of any assignment till after his death. It was held that there was a valid and complete gift to Mrs. G of the sum on deposit by way of assignment under section 25(6) of the U.K. Judicature Act, 1873, which was replaced by the said section 136(1) of the U.K. Law of Property Act, 1925. Counsel pointed out that the effect of the said statutory provisions has been to improve the position of the donee of a legal chose in action by enabling him to sue at law in his own name as assignee without regard to the question whether the assignment was or was not made for valuable consideration. He also pointed out that even if consideration was relevant there was the deed of compromise signed by the defendant. Counsel then contended, after reference to the defendant's statement of defence, that even if the Chartered Bank had not paid a single cent to the assignor yet it could sue in its own name. He also contended after reference to the said paragraph 5 of the defendant's statement of defence that the plaintiff did not pay any money on behalf of the defendant but had merely purchased the right to sue. Counsel then stated that the said paragraph 6 of the defendant's statement of defence was vexatious and submitted that he had not raised any triable issue. He also pointed out that *In re National Motor Mail-Coach Co. Ltd.*, which was referred to by Mr. Ponniah in his said affidavit, was not concerned with assignment. Mr. Naban concluded his submission by referring to the following passage in the judgment of Robert Goff L.J. in *European Asian Bank* v. *Punjab and Sind Bank*[3]:

"this court has made it plain that it will not hesitate, in an appropriate case, to decide questions of law under Ord. 14, even if the question of law is at first blush of some complexity and therefore takes 'a little longer to understand'. It may offend against the whole purpose of Ord. 14 not to decide a case which raises a clear-cut issue, when full argument has been addressed to the court, and the only result of not deciding it will be that the case will go for trial and the argument will be rehearsed all over again before a judge, with the possibility of yet another appeal (see *Verrall* v. *Great Yarmouth BC* [1980] 1 All E.R. 839 at 843, 845-846, [1981] 1 Q.B. 202 at 215, 218, per Lord Denning M.R. and Roskill L.J.)."

Counsel then stated that the policy of Order 14 is to prevent delay in cases where there is no defence and submitted that this Court could also dispose of points of law summarily in this case.

When Mr. Ponniah addressed the court, he did not refer to *In re National Motor Mail-Coach Co. Ltd.*, presumably because he realised by then that that case was irrelevant to the present suit as it was only held in that case that the mere fact that a promoter paid the registration fees and *ad valorem* stamp duty on the registration of a company did not in itself entitle him to recover them from the company. Counsel then referred to section 4(3) of the Civil Law Act, 1956, but submitted that the provisions therein were only concerned with the administration of insolvent estates and winding up of companies. I would pause here to point out that that submission was totally unacceptable in view of the judgment of Seah F.J. in the Federal Court case of *Nouvau Mont Dor (M) Sdn. Bhd.* v. *Faber Development Sdn. Bhd.*[4] in which His Lordship had clearly pointed out that the law on assignment is governed by section 4(3) of the Civil Law Act, 1956. Mr. Ponniah then stated that the notice in this case was given after six months. Here again I would pause to point out that the assignment agreement in this case was dated July 15, 1983, and the notice in writing was dated September 20, 1983, and that in the said affidavit affirmed by Mr. Ponniah himself on August 21, 1984, it was not stated that the notice was given after six months. Mr. Ponniah then submitted that even if there was consideration there was no intention on the part of the assignee to create legal relationship with the debtor. It was therefore his contention that there was no debt and therefore no assignment to the plaintiff.

Having considered the arguments of counsel and also having considered the various affidavits and pleadings filed in his case, I was satisfied that the defendant was indebted to His Royal Highness in the sum of $120,000 and that there was an assignment in writing of the debt in this case under the hand of the assignor, that is, D.Y.M.M. Yang Di-Pertuan Besar Tuanku Ja'afar ibni Al Marhum Tuanku Abdul Rahman. The assignment was absolute and did not purport to be by way of charge only. Express notice in writing of the said assignment was also given to the debtor, that is, the defendant in this case from whom the said assignor would have been entitled to claim the debt or thing in action. The provisions of section 4(3) of our Civil Law Act, 1956, have been complied with and there was no defence to the plaintiff's claim. I therefore allowed the appeal by the plaintiff against the decision of the learned Senior Assistant Registrar and ordered that the plaintiff be granted leave to sign final judgment against the defendant for the sum of $120,000 with interest at the rate of 8% per annum from October 15, 1983, to the date of payment and costs.

Appeal allowed.

Solicitors: *Skrine & Co.; Stanley Ponniah, Ng & Soo.*

BANK BUMIPUTRA MALAYSIA BERHAD v. DARNAZ ENTERPRISE SDN. BHD. & ORS.

[O.C.J. (Gunn Chit Tuan J.) June 27, August 29 & December 30, 1985]

[Kuala Lumpur – Civil Suit No. C356 of 1982]

Contract – Overdraft facilities – Guarantee – Plaintiff filed suit against defendants – Defendants filed claim against 2nd third party for indemnity against plaintiff's claim and costs – 2nd third party one of the joint and several guarantors – Application by 2nd third party to strike out defendants' statement of claim.

Practice and Procedure – Third party proceedings – Guarantee – Application by 2nd third party to strike out defendants' claim – R.H.C. 1980, O. 18 r. 19.

Banking – Overdraft facilities – Guarantee – Indemnity.

On February 26, 1982, Bank Bumiputra Malaysia Berhad (the plaintiff) filed a suit against the first defendant as the principal debtor on three overdraft facilities to the extent of $350,000, $150,000 and $150,000 respectively, making a total of $650,000. The second to fifth defendants jointly and severally guaranteed the aforesaid overdraft facilities by executing a letter of guarantee to that effect. The defendants subsequently brought third party proceedings on May 21, 1982 against the 1st and 2nd third parties. In the case of the 2nd third party the defendants claimed against him to be indemnified against the plaintiff's claim and costs in this suit on the grounds that the 2nd third party was one of the joint and several guarantors to the aforesaid guarantee.

On February 6, 1984 the 2nd third party applied by summons-in-chambers to strike out the statement of claim of the defendants under Order 18 rule 19 of the Rules of the High Court, 1980.

Held: (1) in this case the principal debtor, that is, the first defendant, has not paid the creditor, that is, the plaintiff, the principal sum and interest or any part thereof, and has no cause of action against the surety, that is, the 2nd third party. A surety against whom an action is brought on his guarantee may obtain indemnification by issuing a third party notice against the principal debtor, but while the surety can call in the principal debtor, the principal debtor cannot call in the surety;